Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

JOHN WILBUR McFADDEN, JR., M.D.,

Petitioner,

v.

MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a violation of the right to due process of law occurs when a physician's right to practice is restricted as a result of a proceeding before a board in which investigative, prosecutorial and adjudicative functions were combined and where the actions and statements of the board members cast substantial doubt on their impartiality.

2. Whether, in the course of a medical board disciplinary hearing, the presentation of testimony, including opinion testimony, by hearing officers who are not subject to cross-examination, violates the right to due process of law.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	iv
Opinions Below	1
Statement Of Jurisdiction	1
Constitutional Provision Involved	2
Statement Of The Case	2
A. Prior Proceedings In This Case	2
Reasons For Granting The Writ	3
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) 8

Wildberger v. AFGE, 86 F.3d 1188 (D.C. Cir. 1996) 4

Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975) 4, 5, 9

Statute:

28 U.S.C. § 1257 1

United States Constitution:

Amendment XIV, Section 1 2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Mississippi Dated February 4, 1999 ..... 1a

Appendix B — Judgment Of The Chancery Court Of The First Judicial District Of Hinds County, Mississippi Dated And Filed October 14, 1997 ..... 38a

Appendix C — Opinion Of The Chancery Court Of The First Judicial District Of Hinds County, Mississippi Dated And Filed October 8, 1997 .. 40a

Appendix D — Determination And Order Of The Mississippi State Board Of Medical Licensure Dated November 22, 1996 ..... 60a

Appendix E — Letter Of The Supreme Court And Court Of Appeals, State Of Mississippi Denying Motion For Rehearing Dated April 15, 1999 ... 97a

Petitioner, John Wilbur McFadden, M.D., respectfully petitions this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Mississippi in favor of Respondent, Mississippi State Board of Medical Licensure.

OPINIONS BELOW

The Supreme Court of Mississippi affirmed the decision of the Chancery Court of Hinds County, Mississippi in an opinion which has not yet been officially published, but is published as *McFadden v. Mississippi State Board of Medical Licensure*, No. 97-CC-01410-SCT, 1999 WL 47785 (Miss. Feb. 4, 1999). Dr. McFadden timely filed a motion for rehearing before the Supreme Court of Mississippi, which was denied by an unpublished order entered on April 15, 1999.

The unpublished opinion and order of the Chancery Court of Hinds County, Mississippi, affirming the decision of the Mississippi State Board of Medical Licensure as well as the opinion and order of the Board are included in the appendix to this petition.

STATEMENT OF JURISDICTION

The Supreme Court of Mississippi entered judgment on February 4, 1999. Dr. McFadden filed a timely motion for rehearing, which was denied by order entered on April 15, 1999. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of Section 1 of Amendment XIV to the Constitution of the United States, which provides, in pertinent part, that no state shall "deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

This action was instituted by the Mississippi Board of Medical Licensure ("the Board") to sanction John Wilbur McFadden, Jr., M.D., a physician licensed to practice in the State of Mississippi. Dr. McFadden's practice is concentrated in the field of pain management, primarily through the administration of narcotics. The Board charged Dr. McFadden with violation of medical standards, on primary allegations that he had: (1) over-prescribed pain medications to certain patients; and (2) prescribed pain medications without adequately documenting his examinations and diagnoses that would justify administration of the medication.

Dr. McFadden seeks review of the decision of the Supreme Court of Mississippi, in which that court upheld the Board's order stripping Dr. McFadden of the authority to write prescriptions for controlled substances, which effectively terminated Dr. McFadden's right to practice in his chosen field.

A. Prior Proceedings In This Case

The charges against Dr. McFadden were brought by means of an affidavit prepared by an investigator who was

employed by the Board and assisted by the Board's medical consultant. The hearing on those charges was held on November 21-22, 1996. Following the hearing, the Board issued its Determination and Order dated November 22, 1996. [App., pp. 60a-96a].

Dr. McFadden filed a timely appeal to the Chancery Court of Hinds County, Mississippi, contending, *inter alia*, that he had been denied due process of law. The Chancery Court affirmed the decision of the Board by Opinion entered on October 8, 1997. That part of the court's opinion addressing Dr. McFadden's due process arguments may be found at pages 46a through 52a of the Appendix.

Dr. McFadden then filed a timely appeal to the Supreme Court of Mississippi. That court affirmed the decision of the Chancery Court by opinion entered on February 4, 1999. *McFadden v. Mississippi State Board of Medical Licensure*, No. 97-CC-01410-SCT, 1999 WL 47785 (Miss. Feb. 4, 1999) That court's analysis of Dr. McFadden's due process claims appears at pages 29a through 37a of the Appendix. Dr. McFadden then filed a timely motion for rehearing, which was denied by Order entered on April 15, 1999. [App., p. 97a].

REASONS FOR GRANTING THE WRIT

The opinion of the Supreme Court of Mississippi is in conflict with prior decisions of this Court and the federal courts of appeals in two important respects. First, although the Supreme Court of Mississippi recognized that "[w]hile several comments made by the Board members could fairly be characterized as hostile," it held that even open hostility toward Dr. McFadden and his witnesses did not provide

evidence of bias which would render the hearing fundamentally unfair. In reaching this conclusion the court failed to factor in that it was dealing with an administrative hearing in which investigative, accusative and adjudicative functions were combined in the same board.

The court addressed Dr. McFadden's complaint concerning the combination of functions as if it were a wholly separate issue and dismissed it, citing *Withrow v. Larkin*, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). It then addressed whether the statements made by Board members during the course of the hearing evidenced actual bias. This approach, treating the two as separate issues, is clearly contrary to the approach taken by the federal courts of appeal, which have read *Withrow* as standing for the proposition that "Where, however, evidence casts doubt on the partiality of the [hearing officer] the combination of prosecutorial and adjudicatory functions in a single person can present due process concerns." *Wildberger v. AFGE*, 86 F.3d 1188, 1195 (D.C. Cir. 1996). The evidence in the case *sub judice* certainly casts doubt on the impartiality of the hearing officers.

Furthermore, in relying on *Withrow*, the Supreme Court of Mississippi ignored critical differences in the facts in *Withrow* and the facts in this case. In *Withrow*, this Court pointed out that although the same agency conducted both the hearing to determine whether charges would be brought and the dispositive hearing on those charges, the panels at each of those hearings consisted of different individuals within that agency. Here, the medical consultant who assisted in the investigation of Dr. McFadden, and who actually selected the four patient files which were to be reviewed by the Board, sat with the Board during the

hearing, and fully participated with the Board in making its findings of fact reaching its ultimate opinion.

Second, there was missing in *Withrow* any evidence that the board members had prejudged the case based on their pre-knowledge of some of the evidence. Here, there is overwhelming evidence of such prejudgment in the statements made by the Board members during the course of the "adversary hearing leading to ultimate decision." Throughout the course of the hearing, the Board members continuously interrupted testimony being given or elicited by Dr. McFadden to interject criticisms of the witnesses and of the medical theories being presented by them. For instance, Board members interrupted the testimony of Dr. McFadden's expert witness, who is imminently qualified in the field of pain management, to tell him that his method was "dishonorable" and that he was "wrong." The board members did not weight the evidence; they chastised the witnesses trying to present it, in accordance with their own predetermined conclusions.

After being cross-examined by the licensed attorney who served as prosecutor for the Board, each of Dr. McFadden's witnesses was attacked by virtually all of the panel members. Dr. McFadden was told during the course of this "cross-examination" by the judges, that he was "dangerous," that he was being cruel to his patients, that his testimony was "meaningless," and that the panel did not want Dr. McFadden's theories on fibromyalgia[1]. One

1. This was a significant comment because Dr. McFadden was charged with failing to make diagnoses which would justify his findings of intractable pain. Fibromyalgia was one of the diagnoses that Dr. McFadden had made, but the panel did not even want to hear his testimony regarding that condition and the pain that can result from it.

panel member even suggested that Dr. McFadden was using drugs, an accusation for which there was no supporting evidence. Another member of the panel summed up the prevailing attitude by stating during questioning that Dr. McFadden would never convince him, although the burden of proof was on the Board as a matter of state law to prove by clear and convincing evidence that Dr. McFadden had violated standards.

The panel members also took advantage of every opportunity to present evidence, although none of them took the witness stand or was in any way subject to being cross-examined. Panel members gave their opinions on depression, suicide, addictionology, and problems with alcoholism. One panel member offered his opinion that pain is not always bad and that Dr. McFadden might actually be hurting his patients by preventing them from feeling their pain, although there was no evidence that such was the case with regard to any of the patients whose treatment was under review. Yet another member of the panel offered his opinion that Ultram, a non-narcotic drug, had a potential for abuse and when Dr. McFadden tried to respond, told him, "I don't care what a detail man's telling you."

During the panel's questioning of Dr. McFadden's expert witness, one of the panel members gave what he described as his "presentation," which covered more than four pages in the transcript. The gist of the speech was that doctors who practice pain management are playing a con game with the medical profession, and are being conned by their addicted patients. There is a raging debate in the medical community in this country between those who advocate the long-term use of opioids for the treatment of intractable pain and those who oppose such treatment except

in terminally ill cancer patients.[2] Dr. McFadden is a leading advocate of the use of narcotics to try to return patients who suffer from pain that cannot be surgically relieved to some semblance of normal functioning. The members of this Board, almost to a person, during the course of the hearing made it clear that they came down on the opposite side of this debate. There was absolutely no evidence that Dr. McFadden was selling drugs to his patients for their recreational use or for them to resell. In fact, no such allegation was made. All of the experts who testified, including the expert retained by the Board, agreed that Dr. McFadden had acted in what he believed to be the best interests of his patients. The Board's expert witness agreed that what we had here was a difference of medical opinion about the administration of large amounts of narcotics over a long period of time. Because of this difference of opinion, Dr. McFadden has been stripped of the privilege of practicing in his chosen field of medicine, and found guilty of "dishonorable or unethical conduct likely to deceive, defraud or harm the public."

There was even further evidence of the Board's prejudgment of Dr. McFadden in the fact that although all of the experts called to testify at the hearing, including the lone expert called by the Board, testified that Dr. McFadden had made adequate examination of the patients whose treatment was under review and had kept adequate records of the medications prescribed, the Board, in its findings did nothing more than adopt the charges which it had filed against Dr. McFadden.

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2. The American Pain Society and the American Academy of Pain Medicine filed a joint brief in support of Dr. McFadden in the Supreme Court of Mississippi as *amici curiae*.

The Supreme Court of Mississippi, in its opinion, did not even address Dr. McFadden's argument that a due process violation occurs when hearing officers base their decision on evidence which they have interjected into the proceeding without right of cross-examination. *See, e.g., Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964).

Dr. McFadden was denied due process by a Board that acted as investigator, prosecutor, unsworn witnesses immune to cross-examination, judge, and jury, which was openly hostile to Dr. McFadden; his witnesses and the evidence he attempted to introduce; and which, in the end, did nothing more than rubber-stamp the charges which had been lodged against Dr. McFadden, even though the testimony of the Board's own expert showed the charges to be unsupported.

CONCLUSION

Issuance of a writ of certiorari is appropriate to correct the erroneous ruling of the Supreme Court of Mississippi, which is in conflict with the opinion of this Court in *Withrow v. Larkin*, and with the opinions of the United States Courts of Appeals cited herein.

Respectfully submitted,

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